

Writing a Will in Kenya

A will is a legal declaration by a person, of his wishes or intentions regarding the disposition of his property after his death, duly made and signed in accordance with the law. A will includes any attachments to the will, explaining or altering any part of the will. Such attachments are known as codicils and have to be signed. A will can either be oral or written. An oral will is only valid if it is made before two witnesses and if it is made three months prior to the testator's death.

Why write a will?

A will provides certainty to the surviving members of the deceased's family, by distributing the property of the deceased according to his wishes. It prevents or minimizes family disputes that are likely to arise during division of property. A will can be used to distribute real property including land as well as movable property such as money, shares in a company, intellectual property and personal effects.

Who can write a will?

Any person, male or female, writing a will has to have testamentary capacity. A person who has attained the age of 18 and who is of sound mind can write a will. A will written under coercion or a threat of violence is void since a person writing a will ought to exercise free will.

Contents of a written will

1. *The testators name and declaration*

A testator is the person making the will. A testator has to make an unequivocal declaration that that is his last will and testament. This is owing to the fact that the latest valid will often invalidates the previous one. This is to say that if X wrote one valid will yesterday and another valid will tomorrow, the new valid will overwrites the previous one. However, an oral will does not cancel a written will.

2. *Gifts/ bequests*

Any property disposed of in a will is known as a gift. A will has to name a gift and the recipient of the gift. This section of the will could also include any conditions that are to be met by the person receiving the gift. A testator can only gift away property that belongs to him.

3. *Name of an executor*

An executor is the person named by the will, who takes charge of the distribution of the assets of the deceased. This is not a mandatory provision in a will. Where an executor is not named, any persons wishing to administer the estate of the deceased have to apply to court to be named as administrators.

4. *Execution*

A will has to be signed by the testator or by some other person in the presence and by the direction of the testator. The signature or mark of the testator or the signature of the person signing for him

has to appear intentional, in order for it to give effect to the document as a will.

5. Attestation

A will must be signed by two or more competent witnesses. Both witnesses must see the testator sign or the person assigned by the testator sign, or an acknowledgement by the testator that the signature or mark by another person was made at his direction. Each of the witnesses must sign the will in the presence of the testator.

Additional Provisions

Although not mandatory, a will could also contain the following provisions:

- Appointment of an executor/ personal representative;
- Appointment of guardians for the testator's minor children;
- Appointment of trustees to administer any trusts set up by the will;
- Directions for payment of taxes and other liabilities of the testator;
- Directions on how the testator's body should be disposed. However, these directions are not compulsory and may be disregarded since there's no property in a dead body.

Invalidity of Parts of the will

The invalidity of certain parts of the will may not invalidate the entire will. For instance, where the testator gave out property that does not belong to him, then such a gift cannot pass to the intended recipient. This only invalidates that specific gift but does not affect the entire will. The courts have power to alter the contents of a will under certain circumstances. For example, if the will does not make reasonable provision for a dependant, the court may order that such a dependant be provided for from the testator's net estate.

Obtaining Grant of Probate

The authority of an executor to distribute the assets of the deceased is given by the will. An application for and grant of probate where there is a will merely reaffirms this authority. Where the deceased died having written a will and named an executor, the executor is to apply for the grant of probate unless he refuses or declines to do so. The application for grant of probate is made by filing in the registry a petition and an affidavit in the prescribed form, the original will plus two copies of the will and an original death certificate. If all documents are in order, the Deputy Registrar places the file before the judge. It is then advertised in the Kenya Gazette. If no objections are raised within 30 days, letter of grant of probate is issued with a copy of the will attached. The grant is confirmed after a period of six months.